**ONG CHOON LIN**

**v.**

**THE NEW ZEALAND INSURANCE CO. LTD.**

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 330 OF 1983]
1 DECEMBER 1990

***INSURANCE*****:** *Fire policy - Warranty as to licensing of business - Licensing regulations not in force at time policy entered into - Void ab initio - Doctrine of severance - Time barred - Limitation law - Difference between adjustment by insured and adjuster - Fraudulent - Beyond reasonable doubt - Contracts Act 1950, s. 29.*

***LIMITATION*****:** *Fire Insurance policy - Time barred - Void - Limitation law in force - Contracts Act 1950, s. 29.*

On 29 November 1981, the plaintiff P's premises were destroyed by fire; P was a dealer of motor spare parts and accessories. P's claim under the fire policy from the defendant N2I was rejected. The policy came into force on 21 May 1980 during which there were no regulations in force which required any business of any kind to be licensed (as was required in the warranty attached to the policy); these regulations came into force on 4 February 1981.

The issues were the validity of the warranty, nature of the breach, the doctrine of severance of contract, whether the claim was time barred as it was filed after the 12 months period specified in condition 19 of the policy (*contra* s. 29 Contracts Act) and whether P's assessment of the damage which was different from the adjuster, was fraudulent.

**Held:**

**[1]** In contract law the breach of a warranty gives a right only to claim for damages; in the field of insurance law, the word "warranty" has long since assumed an opposite meaning and entitles the innocent party to repudiate the insurance contract; therefore the breach of warranty 9A would have entitled the insurer to repudiate the insurance contract and its liability under it.

**[2]** However from the evidence, the warranty was impossible of fulfillment *ab initio* and was therefore, a nullity, and the failure to fulfil it has no effect upon the validity of the policy.

**[3]** Although the warranty was void *ab initio*, taking into account the terms of this policy which contained distinct and separate promises on the part of the insurer and the insured, under the doctrine of severance, the warranty could be discarded and the rest of the terms of the policy is enforceable.

**[4]** Condition 19 of the policy was void by virtue of s. 29 of the Contracts Act 1950 as the period in the policy was less than the period allowed by the law of limitation in s. 29 (*Royal Exchange v. Teck Guan* followed.)

**[5]** Taking into consideration the circumstances under which P assessed the claim and the potential tendency of adjusters for the insurer playing down the value of the damage, the insurer had failed to prove beyond reasonable doubt that P was fraudulent in the amount he was claiming.

*[Judgment for the plaintiff.]*

**Cases referred to:**
*Provincial Insurance Co. v. Morgan [1933] AC 413*
*Murugesan v. Krishnasamy & Anor. [1958] MLJ 92*
*Bennet v. Benett [1952] 1 All ER 412*
*Chop Eng Thye v. Malaysia National Insurance Sdn. Bhd. [1977] 1 MLJ 161*
*Royal Exchange v. Teck Guan [1912] 3 FMSCR 92*
*Teh Say Cheng v. North British & Mercantile Insurance Co. Ltd. [1912] FMSLR 248*
*Tai Lee Finance v. Official Assignee & Ors. [1983] CLJ (Rep) 387*

**Legislations referred to:**
Contracts Act 1950, s. 29
Contracts Enactment, s. 28

*For the plaintiff - C.S. Kumar; M/s. Tung & Kumar*
*For the defendant - D.C. Alfred; M/s. Sengara & D.C. Alfred*

[**Editor's. Note:** The defendant has lodged an appeal.]

**JUDGMENT**

**Peh Swee Chin J:**

Three points have emerged from the evidence and submissions in this case and after delivery of a brief oral judgment, Mr. Kumar, learned Counsel for the plaintiff has subsequently written and urged me to give a written judgment which he said would be "of great interest to the legal community ..." In the meantime, the defendant has now appealed from my judgment, so here it is.

Very briefly, the facts are that on 29 November 1981, a fire occurred at the premises of the plaintiff (hereafter called the "insured") where he had hitherto carried on a business of dealers of motor spare parts and accessories. The insured who had taken out a fire policy from the defendant, (hereafter called the "insurer") in respect of the contents in the premises duly made a claim to the insurer. The claim was subsequently rejected, hence the present action by the insured.

Of the 3 points mentioned above, one was the point that there was a breach of "Licence Warranty No. 9A" of the insurance policy in question.

The said warranty was contained in a type-written slip attached to the policy and was similar in effect to an endorsement, a well-known method of alteration of a printed standard policy. The warranty was in the following words:

> (2) Warranted that during the currency of this policy the Insured shall hold such Licence or Licences as is or are required by the Local Municipal or other Authorities and shall fully comply with the conditions and requirements thereof at all times.

When the policy was taken out, it came into force on 21 May 1980 when no regulations of any kind were on force which would require any business including the business of insured to be licensed. The policy in its original form was renewed on 9 May 1981, for another year.

The regulations or by-laws requiring the licensing of the business came into force 7 to 8 months after the policy itself came into force, i.e. 4 February 1981; when the said fire took place on 29 November 1981 the said business was still unlicensed though it was licensed subsequently.

According to Mr. Edwin Tan, DW3, the branch manager of the insurer, he agreed that the said warranty at the time of commencement of the policy was redundant as the business was not required by law to be licensed.

It was argued for the insured that the warranty was incapable of performance, further, this warranty was not within the contemplation of both parties when the contract of insurance was made and in any event it was not a true warranty and did not go to the root of contract as DW3, the branch manager had stated that the warranty had a bearing only on the premium but no bearing on the risk (insurable risk). Authorities were cited in support of the above propositions.

It was argued on behalf of the insurer that ignorance of the law was no excuse for the insured saying that he was not aware of the new by-laws. It was a breach of the warranty for which the insurer was entitled to and did repudiate liability. Learned Counsel explained the necessity of complying with a warranty.

In my opinion, possibly due to the indiscriminate use of the words of "conditions" and "warranties" in Courts in days gone by, there has grown a very peculiar contradiction in terms between the 2 words in the law of contract. Generally, in the law of contract, a condition is a term of contract, the breach of which entitles the innocent party to repudiate the contract while a warranty is a term the breach of which only gives a right only to claim for damages. However, in the field of insurance law, the word "warranty" has long since assumed an opposite meaning i.e. it is term which entitles the innocent party to repudiate the insurance contract. Just to mention a short passage from Lord Wright in the House of Lords in *Provincial Insurance Co. v. Morgan* [1933] AC 413, at p. 235 where his Lordship said:

> On the other hand it is clear law that in insurance, a warranty or condition (because these words are used equivalent in insurance law, which in that respect differs from the law of sale of goods).

The conclusion was that the warranty would have to be given the usual effect, i.e. the warranty 9A was in effect a condition the breach of which would have entitled the insurer to repudiate the insurance contract and its liability under it.

My second finding was that from the evidence, the warranty was impossible of fulfillment *ab initio*. What was the effect then?

In E.R. Hardy Ivamy's "*General Principles of Insurance Law*", 3rd Edn., at p. 268, in considering the question of breach of condition, Professor Ivamy had this to say:

> where however the condition is impossible of fulfillment *ab initio*, it is a nullity, and the failure to fulfil it has no effect upon the validity of the policy.

I agreed with the statement of the law, but I had to consider further as to whether without this void warranty, the rest of the contract of insurance was still enforceable, or whether the policy must fail in toto having regard to the status of the warranty 9A described above.

This would bring to the mind the doctrine of severance of the void contract from its valid part.

This policy in question contained distinct and separate promises on the part of the insured for the promise of indemnity of the insurer in case of fire. There was at least the promise to pay insurance premium the payment of which was never in question. Discarding the warranty 9A which was void *ab initio*, could the rest of the terms of policy between the insurer and the insured stand, and remain enforceable? My answer was affirmative.

Thus in *Murugesan v. Krishnasamy, & Anor.* [1958] MLJ 92, where *inter alia*, the holder of temporary occupation licence (TOL) in respect of the State land had applied for land title to the land and had promised to transfer the title to the promisee when such title was issued as a result of certain payment to the promisor who allowed in addition the promisee to enter the land and enjoy its income. The application for land title was rejected by the State Government. The Court there found that the promise to allow the promisee to enter the land was illegal as it was an attempt to transfer certain rights of the TOL, but this illegal promise could be severed from the promise to transfer the title when it was issued, the latter promise being good in law which would have entitled the promisee to sue for specific performance, had the government approved the application for the land title. Thomson CJ, (as he then was), in so deciding had relied also on *Bennet v. Benett* [1952] 1 All ER 413 when Lord Denning said:

> If the void covenant goes only to part of consideration so that it can be ignored and leave the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant.

This much for breach of the warranty in question.

Yet another vital point raised by the insurer was that since the present action was filed 12 months after the fire the insured's claim was barred by condition 19 of the policy in the following words:

> 19. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

It was so argued on behalf of the insurer on the authority of a decision of the High Court in *Chop Eng Thye v. Malaysia National Insurance Sdn. Bhd.* [1977] 1 MLJ 161, in which the action there was filed 12 months after the happening of the fire there. The High Court had dismissed the claim on a similar condition there.

It was submitted for the insured that *Chop Eng Thye* case was wrongly decided by the High Court as it was never referred to a decision of FMS Court of Appeal in the case of *Corp. Royal Exchange v. Teck Guan* [1912] 3 FMSCR 92 where it was held that a similar condition in the policy there has cut down the period within which an insured might bring an action for breach of contract to a period less than the period allowed by the law of limitation then in force, the condition was rendered void by s. 28 of the Contracts Enactment 1890.

The said s. 28 off the Contracts Enactment was in the following words:

> 13. Every agreement by which every party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals or within limits of the time within which he may thus enforce his rights is void to that extent.

The condition in *Teck Guan* in the FMS Court of Appeal was in the following words:

> If the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection, all benefits under this policy shall be forfeited.

Comparing this condition in *Teck Guan* with our instant condition 19, they appeared to be in *pari materia*. Section 28 of the Contracts Enactment 1890 would appear to be the same with our present s. 29 of our present Contracts Act 1950, word for word, not just in *pari materia.*

Reading the *Chop Eng Thye*, neither s. 29 of the Contracts Act 1950 nor the case of *Teck Guan* had been cited to or dealt with by the Court there. I had no doubt that if that has been done, that case would have been decided differently.

I decided to follow the case of *Teck Guan* and held that condition of the policy to be void by virtue of s. 29 of the Contracts Act 1950.

The third point raised by the insurer was based on condition 13 of the policy which was in the following words:

> 13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if fraudulent means or devices are used by the insured or any one acting on his behalf of obtain any benefit under this policy, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place pursuance of the 18th condition of the policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.

It ought to be pointed out at once that though condition 13 contained 2 parts, one part dealing with fraudulent claim and the other part dealing yet with another contractual limitation of period of filing an action in Court, from the submissions and evidence, it was made abundantly clear that only the point dealing with making fraudulent claim was made an issue by the insurer.

It was submitted that the insured had lodged a report to the police about the fire, in which he estimated the loss at RM300,000 5 days after the fire. When giving a statement to the adjuster, where he, to quote:

> declare to the best of my knowledge and ability that the total value ... was in the region of RM300,000 at cost price.

However, it was submitted that the adjuster had carried out a physical count since the remnants were visible and found that there was stock to the value of RM177,186.80. After making an allowance for cleaning and reconditioning, the adjuster estimated the loss to be RM98,402.80. After taking further account of loss of 1 month's rent and furniture and fittings, the total loss was adjusted at RM101,946.86.

It was therefore submitted that the adjuster's figure was very much less than that as claimed by the insured and the insured was making a fraudulent claim and in support of this argument, the case of *Teh Say Cheng v. North British & Mercantile Insurance Co. Ltd.* [1912] FMSLR 248 was relied on. In that case, the plaintiff claimed RM67,003.42 but could prove only RM5993.75.

It was argued for the insured that it was merely the personal belief of the insured that the value of the stock was RM300,000. It was pointed out that the adjuster had agreed in evidence that it was not unreasonable for the insured to hazard a guess as to the value of the goods and the adjuster in his report had stated that the pricing of the stock by the insured was reasonable, vide p. 14 of P1. Further, the sole ground for repudiating the insurer's claim was the breach of licence warranty 9A *vide* P9, the letter repudiating the claim of insured, which did not mention that the claim was fraudulent. It was finally submitted that the burden of proof of fraud in Malaysia was that of proof beyond a reasonable doubt, *vide Tai Lee Finance v. Official Assignee & Ors.* [1983] CLJ (Rep) 387.

In my view, the evidence relied on to prove fraud by the insurer would have to be treated as subject to the quality available from the proof beyond a reasonable doubt. I found that the insurer had patently failed to prove the fraud with that well-known degree of certainty. The Court took into consideration the circumstances under which the statements of the insured were made; more probably than not, he was hazarding a guess with all the accounts books, bills, receipts and other documents, having gone up in flames; such documents could alone give a sound foundation on which accurate estimate could be made; possibly with a view to the insurer cutting down his claim as much as possible in any potential negotiation for any settlement so that an estimate from him might just as well take into account some margin for bargaining. Further the value of total loss arrived at by the adjuster in the sum of RM101,946.86 upon a physical count also of the remnants, would appear to bear a reasonable proposition to the estimate of the insured, the estimate being about 1/3 of the valuation by the adjuster. I bore in mind the potential tendency of the adjusters to play down the value as he was retained by the insurer just like those licensed valuers playing up or down their valuations so very often depending on who has retained their services in the land acquisition cases. In any event, there was some just cause for grave suspicion in the cited case of *Teh Say Cheng* where the amount of loss proved by the policy holder there came to about 9% of the amount claimed by him. I found no breach of condition 13 in the instant case.

Since the quantum was agreed at the outset of this case at RM101,946.86 subject to proof of liability, the Court therefore gave judgment for the same with costs.

Also found at [1991] 1 CLJ 601